

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Fair Isaac Corporation, a )  
Delaware corporation, ) File No. 16-CV-1054  
 ) (WMW/TNL)  
 )  
Plaintiff, )  
 )  
vs. ) St. Paul, Minnesota  
 ) September 7, 2016  
Chubb & Son, Inc., a New York ) 9:00 a.m.  
corporation, )  
 )  
Defendant. )  
 )  
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BEFORE THE HONORABLE WILHELMINA M. WRIGHT  
UNITED STATES DISTRICT COURT JUDGE

**(MOTIONS HEARING)**

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

LORI A. SIMPSON, RMR-CRR  
(651) 848-1225

APPEARANCES

For the Plaintiff:

Merchant & Gould, PC  
ALLEN W. HINDERAKER, ESQ.  
MICHAEL A. ERBELE, ESQ.  
Suite 3200  
80 South Eighth Street  
Minneapolis, Minnesota 55402

Merchant & Gould, PC  
JOHN T. WINEMILLER, ESQ.  
Suite 101  
9717 Cogdill Road  
Knoxville, Tennessee 37932

For the Defendant:

Fredrikson & Byron, PA  
LORA MITCHELL FRIEDEMANN, ESQ.  
NIKOLA L. DATZOV, ESQ.  
Suite 4000  
200 South Sixth Street  
Minneapolis, Minnesota 55402

Court Reporter:

LORI A. SIMPSON, RMR-CRR  
Suite 146  
316 North Robert Street  
St. Paul, Minnesota 55101

**P R O C E E D I N G S**

**IN OPEN COURT**

THE COURT: I see I have several things on the bench with me that weren't here when I was last seated. At the bench I have plaintiff's bench book for the September 7, 2016 motion to dismiss and then I have Chubb & Son's motion to dismiss and this is prepared by Fredrikson and it looks like perhaps a PowerPoint in hard copy.

MS. FRIEDEMANN: Yes, Your Honor.

THE COURT: Have both sides received these documents and reviewed them?

MR. HINDERAKER: Yes, I have.

MS. FRIEDEMANN: Yes, Your Honor.

THE COURT: Okay. And is there any objection to my receiving these documents?

MS. FRIEDEMANN: No objection from Chubb & Son, Your Honor.

MR. HINDERAKER: And none from the plaintiff.

THE COURT: Okay. And these are, I assume, illustrative aides and not exhibits; is that correct?

MR. HINDERAKER: That's also correct, at least for me, Your Honor.

MS. FRIEDEMANN: Yes, Your Honor.

THE COURT: Very good. Thank you.

Counsel, I'm ready to proceed when you are.

1 MS. FRIEDEMANN: Thank you, Your Honor. I am Lora  
2 Friedemann from Fredrickson & Byron representing Chubb &  
3 Son, and with me is Nick Datzov.

4 As the Court is aware at this point, what this  
5 case is about is that FICO is trying to take away the  
6 license that Chubb & Son paid for. And that claim fails for  
7 at least three reasons.

8 First, the relevant clause requires expansion of  
9 use and FICO acknowledges that they have not pled that  
10 Chubb & Son's use expanded.

11 Second, the deemed assignment language in the  
12 contract is triggered only if Chubb & Son, the contracting  
13 party, undergoes an assignment event and no such event  
14 occurred.

15 And then third, FICO has not pled any facts that  
16 would provide a reasonable basis for withholding consent  
17 even if consent was required.

18 So I am going to talk --

19 THE COURT: Why is the last point of significance?

20 MS. FRIEDEMANN: It is for a couple of reasons,  
21 Your Honor, and the fighting point here -- I think the  
22 parties agree on the language of the provision at least with  
23 respect to that they can't unreasonably withhold consent and  
24 the fight is simply whether they can state a claim without  
25 pleading facts that would allow them to withhold consent.

1           The reason that we say that they can't plead a  
2           claim without that is really twofold. It boils down to the  
3           elements of a breach of contract claim in light of Iqbal and  
4           Twombly.

5           So this is sort of elementary stuff, but the  
6           elements of breach of contract, there are two that I think  
7           are encompassed by this lack of any pleading of a basis for  
8           withholding consent.

9           One is that an alleged breach has to be a material  
10          breach. That is black letter law. So our position would be  
11          even if they have alleged that there was a breach here, they  
12          have not alleged a material breach because even if we had to  
13          seek consent -- of course we say we didn't, but let's assume  
14          we did. If there's no grounds for withholding it anyway,  
15          there's no material breach.

16          And then another element of breach of contract,  
17          Your Honor, is damages. In our slide deck, and I'll go over  
18          it quickly when we get to that point, I've referenced a  
19          case. It's the US Salt case. It's representative of this  
20          point. It arises in the summary judgment context, but  
21          stands for the proposition that you can't prevail on a  
22          breach of contract claim if you haven't suffered damages.

23          Now, in applying that at the pleading stage where  
24          we are here, in light of Iqbal and Twombly our position  
25          would be that as plaintiff they would have to allege some

1 factual basis that would give rise to a plausible claim for  
2 damages. You can't simply allege we've been damaged, which  
3 is what we would say this complaint does.

4 And beyond that I would say the following: If the  
5 alleged breach here is simply a failure to seek consent when  
6 they couldn't withhold it anyway, then I don't think they  
7 can plead damages.

8 THE COURT: And so no damages because consent was  
9 not necessary or no damages because damages would be so  
10 *de minimis* they aren't able to be measured?

11 MS. FRIEDEMANN: Well, we don't think it was  
12 necessary for us to seek consent with respect to the first  
13 portion of Your Honor's question.

14 And with respect to the second scenario, if we did  
15 have to seek consent, and we acknowledge we did not, it's  
16 not just that damages would be *de minimis*. It's hard to  
17 conceive of how there could be any damage absent a basis for  
18 withholding that consent.

19 THE COURT: So what's the point of having a  
20 consent requirement if I determine there is one?

21 MS. FRIEDEMANN: What is the point of having it?

22 THE COURT: Right.

23 MS. FRIEDEMANN: Well --

24 THE COURT: I'm just trying to preserve your  
25 argument that there's no requirement, but assume there is.

1 MS. FRIEDEMANN: Sure. Well, if there is, I guess  
2 my answer to the question is that in order to actually  
3 prevail on a claim for breach, they would have to show both  
4 materiality and that some damage flowed from the failure to  
5 seek consent. And if there's no grounds for withholding  
6 consent, again, it's hard to conceive of any basis for  
7 damages.

8 You know, if there is one, I'm sure Mr. Hinderaker  
9 will elaborate on it today and then, you know, perhaps --  
10 then if there was a ground for it, it should be pled because  
11 under Iqbal and Twombly it's pretty clear you can't just say  
12 we think there was a breach and we've been damaged.

13 Acknowledge that in most breach of contract cases  
14 that is kind of how it has been pled, but I also think this  
15 is a bit of a different scenario because in the typical  
16 breach of contract case, once you've laid out all the facts  
17 of the alleged breach and then allege that it was material  
18 and there was damage, that that may flow from the facts  
19 pled. Not so here because if the breach they're really  
20 arguing about is a failure to seek consent when it's  
21 meaningless because they have to give it to us --

22 THE COURT: Why do they have to give you consent?

23 MS. FRIEDEMANN: Because there is -- I think it's  
24 undisputed here, at least acknowledged, that there's no  
25 expansion of use of the software following the merger in

1 issue.

2 So from the papers I'm sure the Court understands  
3 that my client, Chubb & Son, is an operating division within  
4 Federal Insurance Company.

5 THE COURT: Um-hmm.

6 MS. FRIEDEMANN: And then Federal Insurance  
7 Company is a subsidiary, wholly-owned subsidiary, of the  
8 Chubb Corporation pre merger and then the Chubb Corporation,  
9 the parent, was acquired in a transaction; and that's pled  
10 by the plaintiffs in the complaint.

11 We have a number of reasons for saying that  
12 consent is not required under those circumstances, but at  
13 the end of the day there is no expansion of use by Chubb &  
14 Son. We simply -- or my client simply continued using the  
15 software the same way they had been the day before the  
16 merger as the day they did after. There's no allegation --

17 THE COURT: So no consent is necessary because  
18 there's no expansion of use, that's the nub of your  
19 argument?

20 MS. FRIEDEMANN: That is the nub of my argument,  
21 Your Honor.

22 THE COURT: Okay.

23 MS. FRIEDEMANN: And if we could take just a short  
24 step back, one of the things I think is important here by  
25 way of background is the price my client paid for the



1 enterprise-wide license in issue here.

2 And the Court probably noted, as did we, that that  
3 information was redacted by FICO in their complaint and the  
4 copy of the agreements attached to the complaint. We do  
5 take issue with that. I think if they're going to bring a  
6 federal lawsuit, that they don't get to just black out  
7 information they don't want part of the public record. But  
8 at least for the Court I've provided that information here.

9 THE COURT: Can I go back to your other argument.  
10 So I'm looking at the no assignment provision, which I think  
11 is critical to your argument, about no expansion of use and  
12 if I look down -- let's go from -- I'm looking at paragraph  
13 10.8, which is No Assignment, and then I'm looking at -- I  
14 think it's easiest to count from the bottom of paragraph  
15 10.8, which is one, two, three, four lines. So it says,  
16 "Any attempt to assign or transfer all or any part of this  
17 Agreement without first obtaining such...consent will be  
18 void and of no force or effect." Why is that not material  
19 to the analysis here?

20 MS. FRIEDEMANN: Well, it's certainly part of the  
21 contract language. We're not saying that the Court ignores  
22 it, but you need to read that sentence in conjunction with  
23 the prior sentence, which indicates that in a deemed  
24 assignment scenario, which is kind of the language we've  
25 been using for what we're talking about here to separate --

1 as opposed to an arm's-length assignment, which is dealt  
2 with in the first sentence.

3 So in a deemed assignment scenario, in the second  
4 sentence it indicates that consent is required only if  
5 there's expansion of use and then consent cannot be  
6 unreasonably withheld. I should quote it exactly, Your  
7 Honor. I paraphrased.

8 THE COURT: That's what -- I'm trying to pair up  
9 your paraphrase with the language of the contract because  
10 I'll be interpreting the language of the contract. So if  
11 you'll do that and walk me through that, then I'll  
12 understand your argument better.

13 MS. FRIEDEMANN: Right. So this paragraph breaks  
14 down into two different scenarios.

15 THE COURT: Um-hmm.

16 MS. FRIEDEMANN: Scenario one, dealt with  
17 primarily in the first sentence, is in an arm's-length  
18 assignment it says that consent is required, period.

19 But we're dealing with the second scenario that is  
20 contemplated here, which is in a change of control or merger  
21 situation. The paragraph then says that that event shall be  
22 deemed an assignment subject to this section and then here's  
23 the language we think is really critical. It says, "and  
24 Client shall make no expanded use of the Fair Isaac Products  
25 as a result of any such event unless and until Fair Isaac

1 provides such written consent, which will not be  
2 unreasonably withheld."

3 So that's the language that -- our position is  
4 that consent is only required -- that we don't need to seek  
5 consent unless there's an expansion of use.

6 THE COURT: Why does that completely trump the  
7 first sentence of the paragraph, "Neither party shall,  
8 without the prior written consent of the other party, assign  
9 or transfer this Agreement, or any part thereof"?

10 MS. FRIEDEMANN: We're not saying it trumps, Your  
11 Honor, but we are saying that they need to be read in tandem  
12 and that to give meaning to the clause I just read, that the  
13 only logical and reasonable construction of this paragraph  
14 would be that in the deemed assignment scenario that you  
15 seek consent only if there's expanded use or no consent is  
16 required absent expanded use. That's our reading of the  
17 paragraph.

18 Beyond that, I would point out that --

19 THE COURT: So the second sentence negates the  
20 first?

21 MS. FRIEDEMANN: No, I don't believe it negates,  
22 but they do need to be read in tandem and we are dealing  
23 with the scenario in the second sentence, not the scenario  
24 in the first sentence.

25 THE COURT: But we read the whole paragraph --

1 MS. FRIEDEMANN: We certainly do.

2 THE COURT: -- correct, and probably the whole  
3 contract?

4 MS. FRIEDEMANN: Yes.

5 THE COURT: But certainly what's germane to this  
6 argument is the entire paragraph and that's why I'm trying  
7 to understand, and I think you're explaining it carefully  
8 and well, why there is -- how I reconcile the first sentence  
9 with the second sentence and the third.

10 MS. FRIEDEMANN: Yes. Now, Your Honor, the  
11 position taken by Fair Isaac here is that this paragraph  
12 actually contemplates two consents. That reading, we think,  
13 is not a reasonable one and that's because primarily of the  
14 word "such" in the sixth line down.

15 So what FICO is trying to say is that if there's  
16 any assignment here, an arm's-length one or a deemed one,  
17 that you need consent, period. But then if you're also in  
18 this deemed assignment world, which we are allegedly in,  
19 that you need a second consent. That reading, we would  
20 submit, is very strained.

21 THE COURT: How do we address the last paragraph?  
22 Because it seems the last paragraph gives life to your --  
23 I'm sorry. The last sentence of this paragraph 10.8 seems  
24 to give life, breathe life to your argument with the  
25 "notwithstanding the foregoing." Do you see that as helpful

1 language to your analysis or, you know, has no impact on the  
2 analysis?

3 MS. FRIEDEMANN: Your Honor, I'm not sure it has  
4 an impact on the analysis.

5 THE COURT: Okay.

6 MS. FRIEDEMANN: I'm not arguing that that  
7 sentence helps our position here.

8 THE COURT: Okay.

9 MS. FRIEDEMANN: The other -- this is probably a  
10 good time for me to talk about, since we're looking at this  
11 paragraph, the second reason that we say that they haven't  
12 pled a claim here and that is because of the word "client,"  
13 capital C Client in this paragraph.

14 THE COURT: Um-hmm.

15 MS. FRIEDEMANN: So the deemed assignment scenario  
16 comes up when there's a change of control event for the  
17 Client, capital C. The parties defined that in the  
18 contract. It's in the first sentence of the contract.  
19 "Client" means Chubb & Son, a division of Federal Insurance  
20 Company.

21 So under the plain language of this provision,  
22 Your Honor, a deemed assignment, if you will, has to be for  
23 the client, Chubb & Son, a division of Federal Insurance  
24 Company, and not somewhere else in the Chubb family of  
25 companies.

1           What FICO seems to be arguing here -- and there is  
2       no dispute that the merger, as they have pled in the  
3       complaint, was of the Chubb Corporation, the ultimate  
4       parent, not of Chubb & Son, a division of Federal Insurance  
5       Company.

6           So this paragraph really only applies if the  
7       merger or change of control is to the contracting party  
8       itself. Now, if these parties had wanted to draft it more  
9       broadly, they clearly could have. We can all see how that  
10      could have happened pretty easily. But they didn't and so  
11      the Court should enforce this clause as written and then  
12      there is no triggering event here. There's no deemed  
13      assignment because nothing happened to the client, Chubb &  
14      Son, a division of Federal Insurance Company.

15          Now, I took Your Honor a little bit away from the  
16      one argument we had been focusing on to a new one. I don't  
17      want to move on if the Court still has questions.

18          THE COURT: Thank you for asking. I'm fine with  
19      you moving on.

20          MS. FRIEDEMANN: We talked about this a little  
21      bit. The third reason that we believe that no consent -- or  
22      that there hasn't been a claim pled here is that there was  
23      no reasonable basis for withholding consent. You know, now  
24      that I look at my notes on this, I think I've covered it.  
25      So I will simply --

1 THE COURT: Okay.

2 MS. FRIEDEMANN: -- move on. I think Your Honor  
3 has heard my position on this.

4 There are two forms of a copyright infringement  
5 claim in this complaint, kind of one relating to each of the  
6 alleged wrongs, if you will.

7 So there's a copyright infringement allegation  
8 based on the continued use post merger. I want to address  
9 that aspect of the copyright infringement claim now because  
10 the reason that claim fails is the same three reasons I  
11 talked about with respect to the breach of contract claim.

12 So we would submit that if the Court agrees with  
13 us on any one of those three arguments we made, that it also  
14 means that that copyright infringement claim based on  
15 continued use post merger also fails.

16 All right. With that I will turn, then, to the  
17 other aspect of this complaint, the allegation of  
18 inappropriate disclosure to third parties. Our argument  
19 here is a little bit different. The reason that the  
20 complaint fails to state a claim on this ground is just the  
21 failure to plead facts required under Iqbal and Twombly.

22 The allegation of disclosure to third parties is  
23 conclusory here. It's paragraph 22. I put it on our slide  
24 and it is this: "Chubb & Son has disclosed the FICO  
25 Products to third parties, including at least third parties

1 located in the United Kingdom, Canada, and Australia...."

2 And so the fight here is about whether that  
3 allegation is sufficient to give Chubb & Son fair notice of  
4 the claim in issue. I think everybody agrees that that's  
5 the standard, that the allegation needs to give fair notice.  
6 It's a question of whether that particular allegation does  
7 provide fair notice.

8 And we submit that it does not, that simply  
9 providing the countries where these third parties are  
10 allegedly located does not tell us exactly what's being  
11 alleged here sufficiently to give us notice. That's  
12 especially true in light of the fact that this contract does  
13 allow Chubb & Son to provide disclosure to affiliates.

14 So without more information about what it is  
15 that's being alleged here, we don't know if the allegation  
16 is that a disclosure has been made to someone who is not an  
17 affiliate or whether we would be taking the position that  
18 the disclosure was made to someone who was an affiliate and  
19 therefore allowed under the agreement.

20 I guess at the end of the day it kind of comes  
21 down to a practical question, whether -- I mean, we think  
22 that they clearly under Iqbal and Twombly should plead more.  
23 But if the Court allows this to proceed based on this  
24 allegation, we will spend the first couple months of the  
25 discovery period just kind of nailing down what it is that's



1 being claimed and we can jump-start that if the Court  
2 requires that they replead and identify the third parties so  
3 that when the case does get off and running on this  
4 particular claim, everybody knows what's being alleged.

5 THE COURT: Why doesn't a set of interrogatories  
6 cure the problem that you have with not understanding the  
7 particularity of the claim?

8 MS. FRIEDEMANN: We certainly could find out from  
9 that, Your Honor. Well, we hope so. I mean, in my  
10 experience, and I doubt Mr. Hinderaker will disagree,  
11 interrogatories sometimes don't give you what you're looking  
12 for.

13 So we would ask an interrogatory. We would hope  
14 to get that information back. Ideally we would. If we  
15 didn't, we move to compel. We'd eventually get it, I  
16 acknowledge that, but it takes time and effort that we  
17 shouldn't have to spend on this.

18 THE COURT: And the nature of this motion is what?

19 MS. FRIEDEMANN: We're seeking dismissal.

20 THE COURT: Right.

21 MS. FRIEDEMANN: As to this particular ground,  
22 dismissal without prejudice. I mean, this is not a  
23 merits-based argument.

24 THE COURT: And that is less wasteful than basic  
25 interrogatories, which is a basic tool of discovery in a

1 civil action?

2 MS. FRIEDEMANN: I believe so, Your Honor, because  
3 if our opponent here -- well, let's say if they don't know  
4 more, they have no idea who these third parties are --

5 THE COURT: Then they say that in response to an  
6 interrogatory, correct?

7 MS. FRIEDEMANN: They shouldn't be making the  
8 claim.

9 THE COURT: Right, but that's a big if.

10 MS. FRIEDEMANN: If they do have more, then it  
11 should be very easy for them to plead it. So, you know, we  
12 would say that the more efficient and easier way --

13 THE COURT: But what's the nature of the motion  
14 here? More particularized pleadings? I don't think so.

15 MS. FRIEDEMANN: Well, we are seeking dismissal  
16 without prejudice --

17 THE COURT: Right.

18 MS. FRIEDEMANN: -- with leave to replead,  
19 essentially, if they can.

20 THE COURT: That's a sledgehammer, isn't it?

21 MS. FRIEDEMANN: No, I don't believe so, Your  
22 Honor. That's --

23 THE COURT: As opposed to a scalpel?

24 MS. FRIEDEMANN: No. When there's leave given to  
25 replead, it's simply indicating to the plaintiffs that they

1 need to have more facts in their complaint; and that's a  
2 pretty common, under Iqbal and Twombly, a pretty common  
3 scenario, that a court would say, look, you're not quite  
4 there, so why don't you take another stab at this, put a  
5 little more facts in your complaint so that everybody is on  
6 fair notice and then we'll be off to the races.

7 So my position is that --

8 THE COURT: And they do that by virtue of  
9 dismissal?

10 MS. FRIEDEMANN: Without prejudice and with leave  
11 to replead, yes, Your Honor.

12 Once again, with respect to the copyright  
13 infringement allegation on the alleged disclosure to third  
14 parties, the Court should treat that aspect of the copyright  
15 infringement claim the same way. So if you agree with us,  
16 that should go the same route. If the Court decides this  
17 pleading is fine, then I guess we're not making a separate  
18 argument at this stage with respect to the copyright  
19 infringement claim.

20 THE COURT: And when you say "this pleading is  
21 fine," you mean for purposes of an evaluation of whether the  
22 case should be dismissed without prejudice?

23 MS. FRIEDEMANN: Yes, whether it would meet the  
24 Iqbal and Twombly standard.

25 THE COURT: Gotcha.

1 MS. FRIEDEMANN: Then the final thing I do want to  
2 address is the contention that FICO made that the Court  
3 should disregard our reply brief, and we submit that the  
4 Court ought to consider our brief for two reasons.

5 I do apologize, of course, to the Court that we  
6 were not aware of the Court's seven-day deadline for a reply  
7 instead of the fourteen-day. But even with that, that we  
8 didn't follow that from the Court's practice pointers, there  
9 are two reasons the Court should consider our brief.

10 The first is that the Court's text order on ECF  
11 was provided to FICO's counsel, but not to us. We had not  
12 yet appeared in the case. And second is that there's no  
13 prejudice. And I do want to elaborate a little bit on both  
14 of those.

15 So the Court did issue a text order on ECF on  
16 April 25, 2016 saying, you know, please take note of these  
17 practice pointers, I expect you to follow them. Well,  
18 FICO's lawyers had been admitted in the case and of course  
19 received that notice by e-mail. We had not yet appeared in  
20 the case, so no e-mail directing us to that particular entry  
21 on the docket and we did not become aware of it.

22 So under those -- I would submit there's kind of a  
23 fundamental unfairness in treating that as binding on a  
24 party who didn't receive notice of it.

25 THE COURT: Did you have predecessor counsel or

1 no?

2 MS. FRIEDEMANN: No. We were the first.

3 THE COURT: Okay, you're the first.

4 MS. FRIEDEMANN: We were the first. It was before  
5 we had entered an appearance in the case.

6 THE COURT: I'm just exploring it because I am --  
7 I find your argument persuasive and I want the practice  
8 pointers to be helpful to the Court, but helpful to the  
9 parties and so that's why I'm exploring this. It's not an  
10 adverse question at all. I want to make sure that we aren't  
11 creating traps for the unwary --

12 MS. FRIEDEMANN: Yes.

13 THE COURT: -- that impede the process of, you  
14 know, fair and appropriate litigation.

15 MS. FRIEDEMANN: Yes, Your Honor. Well, you might  
16 find this next part of my argument helpful, then. You may  
17 be aware that some of your colleagues do modify the local  
18 rules themselves, but in a slightly different way.

19 So both Judge Kyle and Judge Doty issue an order  
20 at the outset of the case with their modifications to the  
21 local rules. They do it in a way that has one difference  
22 from the way that Your Honor did it here and that is that  
23 they enter an order that has language in bold, which I've  
24 got on our slide here, that says if a defendant enters an  
25 appearance after this order was issued, you, the plaintiff,

1 have to give a copy to them so that they're on the same  
2 page.

3 THE COURT: Great.

4 MS. FRIEDEMANN: So I've provided samples for the  
5 Court of the language that Judge Kyle uses, and Judge Doty's  
6 is nearly identical, with samples of those orders.

7 So, you know, if that had been the case here, we  
8 would have been on the same page, we would have clearly read  
9 the Court's practice pointers and would have known about the  
10 difference in the deadline.

11 THE COURT: That's very helpful, Counsel. Thank  
12 you.

13 MS. FRIEDEMANN: And then I do have some cases  
14 talking about the lack of prejudice. We did -- of course,  
15 we take this very seriously, that the Court may not consider  
16 our brief, and I did look at the case law in the district.

17 I couldn't find a case where a brief had been  
18 disregarded -- a reply brief had been disregarded as  
19 untimely, especially when it was given to the other side, as  
20 we did here, two months before the hearing.

21 And so there are some examples here on this slide,  
22 including one from Judge Doty where the brief was untimely,  
23 it was filed one week before the hearing, and the court  
24 said, well, it's late, but one week gives the other side  
25 plenty of time to prepare, so no prejudice here and I'll

1 allow it. So in our situation where FICO had our reply  
2 brief two months ago, that's more than adequate time to  
3 consider our arguments and prepare.

4 So to sum up, Your Honor, at the end of the day  
5 the primary claim in this case is based on, in our view, an  
6 unreasonable reading of the clause in the paragraph. We do  
7 think it's a question of law. So if the Court agrees it's  
8 unambiguous, it's a question of law, the Court can resolve  
9 on a motion to dismiss.

10 And we would submit that there is only one  
11 reasonable reading of that provision and it is the one that  
12 we are advancing here and so those claims should be  
13 dismissed.

14 And then as we talked about, the allegation of  
15 inappropriate disclosure to third parties, we should get off  
16 the ground in the right direction here with some more detail  
17 about that in the pleading.

18 And unless the Court has further questions, that's  
19 all I have.

20 THE COURT: Thank you, Ms. Friedemann.

21 MR. HINDERAKER: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. HINDERAKER: Allen Hinderaker on behalf of  
24 Fair Isaac and with me at counsel table is kind of a crowd:  
25 James Woodward, in-house counsel at Fair Isaac, and my

1 colleagues, John Winemiller and Michael Erbele.

2 THE COURT: Thank you.

3 MR. HINDERAKER: So may it please the Court and  
4 Counsel. This is a motion to dismiss based upon the  
5 pleadings, based upon the complaint only.

6 THE COURT: That's a big blunt tool, isn't it?

7 MR. HINDERAKER: I agree, Your Honor. And I'd  
8 like to start my comments with respect to paragraph 10.8 and  
9 I'd like to make also on that same point this observation:

10 I'm standing before you saying that the only  
11 reasonable interpretation of paragraph 10.8 is the one I'm  
12 going to walk through in a moment. I just heard counsel say  
13 the only reasonable interpretation of paragraph 10.8 is the  
14 one she advanced. I will assert that the interpretation she  
15 advances is not a reasonable one.

16 At the best -- at the end of the day from my point  
17 of view, Fair Isaac's, the worst that happens is that the  
18 provision is ambiguous. At the end of the argument from the  
19 Chubb side of the case, the best that happens is that the  
20 argument -- is that the provision is ambiguous and on a  
21 motion to dismiss there's no ground to dismiss because that  
22 ambiguity is the subject matter of the trial.

23 But with that background, let me, if I may, walk  
24 through the -- and I have provided the Court a bench book,  
25 which is provisions, selected provisions, of the contract.



1 I had it retyped exactly just so it's easier for me to read  
2 and it's in numerical order, so 10.8 is on the page of 10.8.

3 And if I might just walk through it, Your Honor.  
4 We have the first sentence, "Neither party shall, without  
5 the prior written consent of the other party, assign or  
6 transfer this Agreement, or any part thereof."

7 In what I'll call a straightforward, if not  
8 typical, scenario, the licensee has the license and goes to  
9 someone else. That licensee wants to sell the license and  
10 someone else wants to buy it. Under that provision the  
11 first sentence applies.

12 It's of note that paragraph 2.1 of the contract,  
13 and we should read all of this together, includes within its  
14 language the fact that the license is nontransferable.

15 As a matter of law, a licensor has the full right  
16 to control to whom it licenses. Fair Isaac has made that  
17 decision when it licensed to Chubb & Son. Should Chubb &  
18 Son wish to assign the license to anyone else, Fair Isaac  
19 maintains the control to decide whether that is someone that  
20 it wants to have a relationship with, someone that it wants  
21 its software products to be disclosed to.

22 So that first sentence and paragraph 2.1 align and  
23 then it goes on, "In the event of," which acknowledges that  
24 we're now dealing with various circumstances which are  
25 different in nature. There are more corporate

1 reorganizations or corporate organizations, so now we're  
2 dealing with the change of the corporation, the corporate  
3 structures, and such a thing as that applies after the fact  
4 of the event, in the event of something happening.

5 Now, what is the something that happens? It is a  
6 change of control, or if the client is merged with, acquired  
7 by or acquires another entity, or undergoes a reorganization  
8 or otherwise acquires the right to process the business of  
9 another entity.

10 Now, relevant to our case, Your Honor, is the fact  
11 that a change of control of the client or when the client is  
12 acquired by another entity, both of those are deemed  
13 assignments.

14 There is the additional phrase "or otherwise  
15 acquires the right to process the business of another  
16 entity," and I submit that that's a circumstance that  
17 relates to the pricing of the license.

18 But when we go back to the fairness behind this  
19 provision overall, what we have is the proposition that Fair  
20 Isaac and Chubb & Son entered into a license with a certain  
21 price and that price is primarily based upon the volume of  
22 business and FICO has the complete control to decide to whom  
23 it wishes to license in the future; and if there is an  
24 acquisition or a change of control of its licensee, it must  
25 consent to that because now that licensee may well be

1 someone else -- or is someone else, actually, and if the  
2 circumstances are such, maybe the pricing decision needs to  
3 be revisited as well to maintain the essential fairness of  
4 the license as it was at the outset.

5 "Each such event shall be deemed to be an  
6 assignment subject to this section," those words are words  
7 that are ignored by Chubb. And "subject to this section" is  
8 that assignments may not occur without written consent.  
9 That language has to be given some meaning.

10 And then the provision goes on to say "and." As  
11 you know from our briefing, Your Honor, "and" is a  
12 significant word in this paragraph. Without doubt "and" is  
13 conjunctive. Without doubt when someone uses the word  
14 "and," the phrases or the provisions on either side of the  
15 "and" are independent undertakings and deserve their each  
16 independent acknowledgement.

17 So given the fact that these corporate events  
18 which can be deemed assignments are after the fact, there is  
19 this "and" which says you shall maintain the status quo  
20 regarding the processing of your business until you get that  
21 consent.

22 Now, if you don't get the consent, well, then the  
23 contract will be terminated because we'll exercise those  
24 rights. If you do get the consent, well, then we've agreed,  
25 FICO has agreed that the event of -- the corporate event is

1 one that it can live with in terms of to whom its software  
2 is now disclosed, as well as the pricing.

3 And then it goes on to say, "which consent will  
4 not be unreasonably withheld." And of course this presumes  
5 that consent is requested in the first instance.

6 Finally, "Any attempt to assign or transfer...any  
7 part of this Agreement without first obtaining such written  
8 consent will be void and of no force or effect," such  
9 consent, again, being such written consent, which refers us  
10 to the first sentence of the provision, but it also refers  
11 us to the language of the second sentence, which says the  
12 deemed assignments are subject to this section. It doesn't  
13 say, "subject to this sentence." It says, "subject to this  
14 section."

15 So, Your Honor, the first time I heard the  
16 argument, the first time I heard even the idea that FICO  
17 believes that two consents are required was when I read the  
18 reply brief of Chubb. The second time I heard that argument  
19 was when I listened here to counsel's presentation to the  
20 Court.

21 I re-read our opposition brief and that argument  
22 is never made, and it's a silly argument. There is not a  
23 requirement for two consents. There's a requirement for one  
24 consent and that consent in this case is required upon the  
25 event that is deemed an assignment.

1           The two-consent requirement, the straw man, if you  
2           will, that Chubb puts up so it can beat it down has Chubb  
3           arguing that in one instance consent can be unreasonably  
4           withheld and in another instance consent cannot be  
5           unreasonably withheld.

6           And I really am incapable of making any further  
7           understanding of that argument of Chubb, but only to respond  
8           this way, that which consent shall not be unreasonably  
9           withheld is a provision that qualifies the entire paragraph  
10          10.8.

11          So we have pled -- so I was going to go to the  
12          point of this being a motion to dismiss based upon the  
13          pleadings. This element of the motion is really not based  
14          upon the pleading. It's based upon whether the contract is  
15          ambiguous or not and it's based upon the interpretation of  
16          the contract assuming the Court thinks it's not ambiguous.  
17          And as I've said, I think the only interpretation favors  
18          Fair Isaac.

19                THE COURT: Meaning it's not ambiguous?

20                MR. HINDERAKER: Meaning that it's not ambiguous.  
21          But that being said, we then move to an argument that is  
22          more based upon the pleadings. And the pleadings set out  
23          the factual circumstances in some detail under which the  
24          client, Chubb & Son, comes to be owned, completely owned, by  
25          somebody else, somebody different, from the time the license

1 was entered into.

2 So we know that in 2006 a thing called Chubb  
3 Corporation was the parent and it wholly owned Chubb & Son.  
4 We know in 2016, after the event of assignment, that Chubb  
5 Corporation ultimately doesn't exist anymore -- there's a  
6 name change, but it doesn't exist anymore and Chubb & Son is  
7 now completely owned by ACE INA Holdings, Inc.

8 To suggest that when your ownership changes  
9 completely, when somebody else owns you, you have not  
10 undergone a change of control I think is an argument that  
11 falls of its own weight. Once it's said, it can't be  
12 followed up. To say that when Chubb Corporation is acquired  
13 by another that isn't a change of control of the client,  
14 Chubb & Son, fails for the same reason.

15 Now, Chubb & Son points the Court to cases about  
16 piercing the corporate veil. Well, those simply miss the  
17 mark altogether. We're not talking about whether the  
18 parent, in fact, has disregarded the separate entity of the  
19 subsidiary to the point where you say they're the same.  
20 We're talking about the fact that the subsidiary now has  
21 completely new ownership and there's somebody else called  
22 ACE INA Holdings, Inc., that has the power, by way of that  
23 ownership, to direct the policies and do everything that an  
24 owner can do relative to a subsidiary.

25 Your Honor, a case that's really on point from

1 New York is Cassoli vs. American Med and Life Insurance  
2 Company. It's from 2015, Southern District of New York,  
3 215 U.S. District Lexis 71009.

4 When you have new ownership, you have had a change  
5 of control. The business law statutes of New York define  
6 "control" as the power to directly or indirectly determine  
7 the management and policies of a corporation.

8 ACE INA Holdings, Inc., is not Chubb Corporation.  
9 Chubb Corporation no longer exists and the subsidiary is now  
10 subject to the directives of a new owner. That, Your Honor,  
11 is a change of control.

12 Now, we hear the argument about expansion of use.  
13 That's not a theory that FICO relies upon for breach. The  
14 breach occurred because consent wasn't requested and it was  
15 required.

16 The facts of expanded use are completely within  
17 the control of Chubb & Son. There's a wall or there's a  
18 curtain, whatever you want to say, but only Chubb & Son  
19 knows what it's doing today relative to what it was doing  
20 before 2016. It's not a theory of breach.

21 You go back into 10.8 and what would happen in  
22 10.8 during that status quo period where the licensee seeks  
23 the consent of the licensor, you would have a conversation,  
24 licensor to licensee, and that conversation would include a  
25 sharing of knowledge, including how are you using it today

1 and what do you intend to do with it tomorrow.

2 And under all of those facts and circumstances you  
3 would then either come to a reasonable consent or not, but  
4 those facts and circumstances haven't been developed because  
5 only Chubb knows how it has changed use of the product.

6 THE COURT: Well, I want to understand your  
7 argument that expansion of use is not a theory of breach.  
8 Can you elaborate on that?

9 MR. HINDERAKER: Yes. Let's -- yes. If the  
10 discovery demonstrates an expansion of breach, that's going  
11 to relate and bear upon what licensing fee would be a  
12 condition for consent.

13 The software is priced on use and if under the new  
14 control the software is used, you know, at a ten times  
15 higher volume of underwriting policies than it was  
16 previously, that's going to bear on the value proposition  
17 and on the licensing fee, but that's a damages element.

18 The breach element is the fact that consent is  
19 required upon the event of assignment. Those events that  
20 are deemed assignments, consent was required and Chubb & Son  
21 didn't ask for that consent and hence it wasn't given. So  
22 that's the breach.

23 We lost control of our ability to decide to whom  
24 we will license. Chubb & Son went through a reorganization  
25 event. It's something that it wasn't before when we



1 licensed with it and we have not had the opportunity to have  
2 that discussion to grant or deny consent.

3 And so in the absence of that opportunity for that  
4 discussion to grant or deny consent, we have terminated the  
5 contract and we have exercised our rights under that  
6 different provision.

7 So I have addressed it, but just to label it,  
8 Chubb & Son makes the argument that the client, Chubb & Son,  
9 has to undergo a change of control; and we have pled the  
10 facts and without doubt that is a change of control.

11 Chubb & Son makes the argument that we have to  
12 prove a negative, that we did not unreasonably withhold  
13 consent. All of the cases that it cites are cases that  
14 arise to the court on a fully-developed record, whether it's  
15 summary judgment after discovery or directed verdicts on a  
16 fully-developed record. And whether consent is unreasonably  
17 withheld or not unreasonably withheld depends upon all of  
18 the facts and circumstances.

19 If Chubb wants to make a defense in this case that  
20 consent under any circumstances had to be given, well, that  
21 defense is for Chubb to make and it's for Chubb to make and  
22 to fail or succeed on based upon a fully-developed record.

23 If I might turn to the question of damages for a  
24 moment, Your Honor, in light of counsel's argument. We have  
25 Chubb & Son continuing to use the software to its financial

1 benefit in the course of business post termination and that  
2 arises to our harm and we have alleged that we're entitled  
3 to the licensing fees for that unauthorized use.

4 We have Chubb & Son distributing, to use the  
5 copyright word, disclosing, to use the contract word, this  
6 software to entities in the UK, Canada, and Australia.  
7 Those usages are licensing fees that Fair Isaac is not  
8 receiving. That loss is a consequence of the actions of  
9 Chubb & Son.

10 Before I get to the copyright claims, I'd like to  
11 make this point. Chubb & Son asserts the proposition to the  
12 Court that if something is a breach of contract it cannot be  
13 a copyright claim, and that simply is not the law. It isn't  
14 even the law of the cases that Chubb & Son cites.

15 The law is simply this. Under 17 U.S.C.  
16 Section 106 there are certain exclusive rights of copyright.  
17 One of them is distribution. One of them is making a copy.  
18 So when Chubb & Son is using the software in its business,  
19 it's making copies. When it's sending that software to the  
20 UK, Australia, or Canada, it's distributing. Those are the  
21 exclusive rights of the copyright holder.

22 When doing that is a breach of the contract, there  
23 is no authority or license to do what was done, it's  
24 unauthorized. So when something is unauthorized under the  
25 license, it's outside of the license; and when it falls

1 within the exclusive rights of copyright, it's copyright  
2 infringement.

3 There are other cases where something falls  
4 outside of the license because it's a breach but it's not  
5 copyright infringement because it doesn't fall within one of  
6 the exclusive categories of Rule 106, and we cited one of  
7 those kind of examples in our brief between conduct that is  
8 copyright-directed conduct and conduct that is not.

9 So we have the failure of consent, not even asked  
10 for. We've terminated the contract. Chubb continues to use  
11 the software. Those are contract damages.

12 We have also the breach of paragraph 9.3. Chubb  
13 is to stop use, return our stuff, or destroy it. Instead  
14 it's continuing to benefit from it.

15 And then we have what I've described as the  
16 distribution to third parties. That's the loss of licensing  
17 fees both under the contract as well as under copyright law.  
18 And we have also pled under copyright law, relative to both  
19 wrongs of distribution and improper use, disgorgement under  
20 the copyright statute.

21 So the copyright statute says to the infringer the  
22 plaintiff, the copyright holder, is entitled to all of the  
23 profits that you are making by way of your copyright  
24 infringement that is attributable to the copyright  
25 infringement.

1           And so all of the use that Chubb is making of the  
2           software, unauthorized use, is resulting in profits and the  
3           extent of those profits that are attributable to copyright  
4           infringement is something that FICO is entitled to.

5           THE COURT:   So one of the arguments that was  
6           advanced by Chubb is that there was no reasonable basis for  
7           withholding consent.   Would you address that argument  
8           directly?

9           MR. HINDERAKER:   I will, Your Honor.   Whether  
10          something is reasonable or unreasonable depends upon knowing  
11          the full facts and circumstances.   As I mentioned, what  
12          exactly Chubb & Son under the new ownership is doing with  
13          this software product is something that Chubb & Son knows,  
14          but we cannot know unless they disclose it to us.

15          Also and maybe of equal, if not more, importance,  
16          we now know that Chubb & Son is not a trustworthy licensee.  
17          Chubb & Son distributes our software products to third  
18          parties in the UK, Canada, and Australia.

19          Fair Isaac may not want to do business with a  
20          licensee that is untrustworthy in that regard or Fair Isaac  
21          may be willing to do business after it understands those  
22          third-party uses and the revenues that it is entitled to  
23          from them and there is a fair exchange of compensation  
24          resulting from this expanded use.

25          And that brings me to a point that I maybe would

1 have fit otherwise, but I think it fits here as well, and  
2 that is: Yes, under paragraph 22 of the complaint we allege  
3 not only the provision of the contract and it's not -- we  
4 don't allege as a conclusion the contract provision has been  
5 breached by distribution. We allege facts; the contract has  
6 been breached by an unlawful distribution to entities in.

7 Now, as the Court knows from the reply memorandum,  
8 sometimes when you think you're getting Chubb & Son and the  
9 right corporate entity with all of the Chubbs that there  
10 are, the other side of the V says you missed.

11 Now, in Minnesota, the Secretary of State when you  
12 go who is registered to do business in Minnesota, it's  
13 Chubb & Son, Inc. We've pled a complaint against Chubb &  
14 Son, Inc.

15 In the reply brief Chubb says that doesn't exist.  
16 You should have sued Federal Insurance Company and Chubb &  
17 Son, its division. Now, what a division is we'll have to  
18 find out. Is a division a subsidiary or is a division an  
19 organizational convenience of Federal Insurance Company?

20 Well, we know and I've disclosed to the  
21 plaintiff -- or to Chubb disclosed how we know. We've  
22 gotten these support calls in from Canada about our product  
23 and from Australia about our product and it's a Chubb  
24 something, but to be able to name the exact entity that is  
25 making those inquiries is information that only Chubb & Son

1 knows. It's information that's on the other side of the V.  
2 So, Your Honor, we have pled everything that we can plead  
3 factually.

4 And then the other provision that relates to this  
5 is paragraph 24 and paragraph 24 is about who is an  
6 affiliate. And on the last page of the bench book I've  
7 quoted the provision that comes from the second amendment to  
8 the license and that identifies who are affiliates.  
9 Affiliates are only downstream entities of the client. The  
10 client has to own whoever it is that is the affiliate.

11 So we have pled and we have a belief that to our  
12 knowledge Chubb & Son, Inc., doesn't have any downstream  
13 entities outside of the United States. We've pled Canada,  
14 Australia, UK, we've pled that those entities outside of the  
15 United States are not affiliates within the meaning of the  
16 contract because they're not downstream from Chubb & Son,  
17 they're not independently owned by Chubb & Son, or  
18 controlled by Chubb & Son.

19 So, Your Honor, at this motion to dismiss stage,  
20 to the extent there are more facts to develop, that's going  
21 to be the subject of discovery. And frankly, the facts that  
22 are at issue here and argued about today are facts that  
23 Chubb & Son knows full well. They are within its control.

24 And whether consent was requested, I guess we both  
25 agree that it was not even requested. Whether at the end of

1 the day consent -- any withholding of consent is  
2 unreasonable, I don't know how you get there when it's never  
3 requested, but that also is a full set of facts and  
4 circumstances that are developed at trial and if Chubb & Son  
5 wants to have that as one of its defenses, it's certainly  
6 privileged to do so.

7 The rest of Chubb & Son's arguments, Your Honor, I  
8 submit are really directed to the merits of this case, which  
9 is another subject matter for trial as opposed to what is  
10 pled.

11 Thank you for your time.

12 THE COURT: Thank you, Counsel.

13 Rebuttal?

14 MS. FRIEDEMANN: Thank you, Your Honor. I'll be  
15 very brief. I want to make two points.

16 First, I want to go back to the statement that  
17 Mr. Hinderaker made that expanded use is not a theory of  
18 breach FICO is making. That goes right to our argument here  
19 and right to the critical language from paragraph 10.8. So  
20 if we look at that again, the problem with the argument that  
21 Fair Isaac is making is they're trying to read out  
22 everything after the "and" in that second sentence.

23 And I apologize for how small this is, Your Honor.  
24 If you want to look at the bench book that the plaintiff  
25 submitted, it is a little bit clearer there.

1 THE COURT: And just get me to the page of the  
2 bench book. We're still looking at 10.8, correct?

3 MS. FRIEDEMANN: Yes.

4 THE COURT: Okay. Gotcha.

5 MS. FRIEDEMANN: It's on the second to the last  
6 page.

7 THE COURT: Okay.

8 MS. FRIEDEMANN: So what they're trying -- they  
9 seem to acknowledge they're not alleging that there has been  
10 any expansion of use here, and that's good. I realize this  
11 is outside the pleadings, but my understanding is there has  
12 been no expansion of use.

13 But if we look at that language after the "and,"  
14 it says, "and Client shall make no expanded use of the Fair  
15 Isaac Products as a result of any such event unless and  
16 until Fair Isaac provides such written consent...." It's  
17 the expansion of use that is the trigger for the need to  
18 seek consent. I think that's pretty clear from that wording  
19 right there in that sentence.

20 Counsel has not provided any explanation that  
21 would give meaning to that clause. As the Court was asking  
22 me earlier, of course you have to give meaning to all of the  
23 words in the contract and read them all together, but we  
24 submit that the argument that Fair Isaac has made here reads  
25 out this provision because it clearly says that it's



1 expanded use that is the trigger that needs to seek -- the  
2 seeking of consent.

3 There's no allegation that there has been expanded  
4 use here, therefore no need to seek consent, that is our  
5 argument, Your Honor. And I think it is interesting that  
6 when the Court questioned Mr. Hinderaker about this, he did  
7 say that they're not saying that there's any breach here  
8 regarding expansion of use.

9 THE COURT: And just define for me what you would  
10 consider expanded use.

11 MS. FRIEDEMANN: Well, what expanded use means  
12 isn't further elaborated upon in the agreement, but clearly  
13 if we had, you know, 20 people using the software pre the  
14 event and then afterwards there were 40 -- right? -- I think  
15 everybody would agree that that would be an expansion of  
16 use. In this case my understanding is absolutely nothing  
17 changed and it's not -- there's no allegation or pleading to  
18 the contrary.

19 THE COURT: If there's a use that's by a different  
20 entity in a different locale, would that be an expansion of  
21 use?

22 MS. FRIEDEMANN: It could be, Your Honor. So if  
23 I'm thinking of that as sort of a theoretical sort of  
24 question, yeah, it could be.

25 THE COURT: So it's been always used in the United

1 States and now we have some subsidiary in England?

2 MS. FRIEDEMANN: If that had been alleged, but  
3 based on Mr. Hinderaker's arguments, the pleadings, that is  
4 not being alleged here. There's no allegation that there's  
5 been an expansion of use post merger and because of that  
6 there's no triggering event that requires the seeking of  
7 consent.

8 The other point I wanted to make and just to be  
9 clear -- it's not relevant really to the merits of the  
10 motion at hand, but with respect to the entity named in the  
11 complaint, the complaint names Chubb & Son, Inc. I just  
12 want to be clear that that is not the right entity. Chubb &  
13 Son, Inc., my understanding, is an entity, it does exist.  
14 We never said it doesn't exist. It does exist. It is not  
15 the entity they're trying to sue here.

16 We've treated it as if they named Chubb & Son, the  
17 division of Federal Insurance Company, and just addressed  
18 the merits, but if the case proceeds, we do believe that  
19 Fair Isaac ought to clear that up and name the right entity.

20 THE COURT: So help me understand your version of  
21 what "assign or transfer all or any part of this Agreement"  
22 means.

23 MS. FRIEDEMANN: Are you looking at the third  
24 sentence, Your Honor?

25 THE COURT: I am looking at -- let me find my

1 periods -- yes, "Any attempt to assign or transfer all or  
2 any part of this Agreement without first obtaining written  
3 consent."

4 MS. FRIEDEMANN: Well, my argument is you do need  
5 to read that sentence in connection with the second  
6 sentence -- well, with the whole provision and it can't be  
7 read to override the fact that in the second sentence it's  
8 expansion of use that is the trigger for seeking consent.  
9 If you do sort of read that sentence as being the  
10 end-all/be-all, then you're not giving any meaning to that  
11 second portion of the second sentence, if I'm being clear.

12 THE COURT: Well, we have that assign or transfer  
13 in at least two places, correct, in this one paragraph? And  
14 so I'm just trying to understand -- I mean, maybe it's  
15 meaningless or maybe it doesn't matter, but I want to  
16 understand why it doesn't matter or if it does have a  
17 meaning, which I assume all words in a provision have a  
18 meaning, they just may not be germane to this controversy, I  
19 want to understand what it means.

20 MS. FRIEDEMANN: Sure. And I think the way to  
21 read all of that together would be that if there had been an  
22 expansion of use which would trigger the obligation to seek  
23 consent, then that also would -- then the third sentence  
24 would also come into play, that if that consent had not been  
25 sought, you know, the deemed assignment would be void and no

1 force or effect.

2 THE COURT: So the topic sentence is broader, the  
3 first sentence is broader than the analysis that you're  
4 lending and I'm trying to reconcile your analysis with the  
5 entire paragraph, so the text in the topic sentence and the  
6 text later on. Help me do that.

7 MS. FRIEDEMANN: Well, I guess I don't agree with  
8 the Court's characterization that it's broader. I think  
9 it's dealing -- the first sentence is dealing with a  
10 different scenario.

11 And if we put it in the language Mr. Hinderaker  
12 was using, that this is for Fair Isaac's protection and  
13 making sure they're getting the value out of their software  
14 and doing business with who they want to do business with,  
15 if there is an arm's-length assignment, simply, you know,  
16 the client says I am assigning this agreement to a different  
17 party, there's more protection for them there and that would  
18 fall clearly within the first sentence and the third  
19 sentence would clearly come into play.

20 But we are not in that scenario. There was no  
21 such event here. There was simply a change of control of  
22 the parent corporation. No allegation of expanded use  
23 following that. My understanding is there is no expanded  
24 use following that. And so if we give full meaning, then,  
25 to the second sentence, even though the third sentence is

1       there, it doesn't come into play unless there is an expanded  
2       use.

3               That's my way of reading all three of those  
4       sentences together, Your Honor, and I do -- I would submit  
5       that Fair Isaac has not provided the Court with an  
6       interpretation that gives meaning to this clause that I'm  
7       focusing on and that means that that interpretation cannot  
8       be correct.

9               THE COURT:   Okay.

10              MS. FRIEDEMANN:   That's all I have.

11              THE COURT:   Thank you.

12              MR. HINDERAKER:   Your Honor, could I have one  
13       minute?

14              THE COURT:   Yes, you may.

15              MR. HINDERAKER:   Thank you.   I provided the Court  
16       this bench book and we talked about paragraph 10.8, and on  
17       that page with 10.8 underneath the second paragraph there is  
18       the strikeouts.   I failed to explain that, and it simply is  
19       this:

20                   As you've heard me argue, the Chubb position  
21       reads -- ignores the words "each such event shall be deemed  
22       to be an assignment subject to this section and."   And when  
23       that phrasing is eliminated, then the first sentence falls  
24       away and the sentence beginning, "Any attempt to assign or  
25       transfer" falls away and what you're left with is I submit

1 the argument of Chubb and that's what's left after the  
2 deletions, which is simply these are events of assignment  
3 and no expanded use shall be made until there's consent.  
4 But that's not what the contract says.

5 Thank you.

6 THE COURT: Anything further?

7 MS. FRIEDEMANN: No, Your Honor.

8 THE COURT: Okay. Thank you, Counsel, for your  
9 arguments today and we are in recess. They are taken under  
10 advisement.

11 (Court adjourned at 10:08 a.m.)

12 \* \* \*

13  
14  
15  
16 I, Lori A. Simpson, certify that the foregoing is a  
17 correct transcript from the record of proceedings in the  
18 above-entitled matter.

19  
20 Certified by: s/ Lori A. Simpson

21 Lori A. Simpson, RMR-CRR  
22  
23  
24  
25